

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the Matter of)

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Review of the Section 251 Unbundling)
 Obligations of Incumbent Local Exchange)
 Carriers)

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY
 CC Docket No. 01-338

Implementation of the Local Competition)
 Provisions of the Telecommunications Act of)
 1996)

CC Docket No. 96-98

Deployment of Wireline Services Offering)
 Advanced Telecommunications Capability)
)

CC Docket No. 98-147

To the Commission:

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SUMMARY

The FCC's overriding objective in this proceeding should be to determine how best to promote local telecommunications competition. The Commission is being presented with two dramatically different sets of proposals for achieving that goal – one by the ILECs and another by state regulators, consumers and competitive new entrants. The FCC's task is to determine which proposal will actually promote local competition. This is an easy task. Consumers have benefited from greater choice in telecommunications services and providers where competition has flourished. Where local competition flourishes, however, the ILECs stand to lose market share. Short-term economic self-interest has led the ILECs to assert positions that, if accepted, would have the effect of killing local competition. That is exactly what they have done. If the Commission accepts the ILECs' proposals, it will do so with full knowledge that it is choosing a politically expedient path which will return us to monopoly rather than lead us to greater competition. If the FCC truly wants to promote local competition rather than merely paying lip service to the ideal, it will listen closely to the entities who must accept the considerable risks of entering the local market to compete against the incumbent monopolists. CompTel speaks for those entities, and is urging the Commission to take action in this proceeding to promote local competition through the robust UNE regime embodied in Sections 251(c)(3) and 252(d)(1) of the Communications Act.

Several statements in agency decisions and the speeches of Commissioners seem to reveal a prevailing sentiment within the FCC that restricting access to UNEs and raising barriers to entry somehow would stimulate facilities-based competition and/or further broadband deployment. This is a ridiculous falsehood propagated by the ILECs, and CompTel is frankly surprised that the Commission is taking it seriously. Congress adopted a strong UNE *statutory*

regime in 1996 because it knew that UNEs would promote local competition and long-term investment in alternative facilities by non-incumbent carriers. The Commission itself adopted a strong UNE *regulatory* regime in 1996 because it knew that this regime would play a critical role in promoting local competition. The ILECs have poured hundreds of millions of dollars into legislative lobbying, legal challenges, and regulatory efforts to tear down both regimes because they know that by doing so they would kill local competition and preserve their legacy local monopolies. The empirical and policy truth is this – new entrants need non-discriminatory access to the full range of UNEs at TELRIC-based rates so that they can establish the market presence (*e.g.*, brand name, customer base, revenue stream, back-office systems) necessary to implement a long-term entry strategy, including the development of facilities-based alternative networks.

Another critical empirical and policy truth is this – it is not the goal of every new entrant, nor should it be, to construct a ubiquitous, redundant local exchange network. For decades, the Commission has correctly recognized that the public interest is supported by many types of competitors, ranging from hybrid carriers who rely in part upon their own facilities, equipment and capabilities, to pure resellers who rely upon marketing prowess and efficient operations to offer consumers lower rates. The FCC claims to want to foster facilities-based competition, yet the questions in the *Notice* suggest that the Commission is considering proposals that would severely harm facilities-based competition. Ultimately, the Commission should leave it to the marketplace to sort out the optimum mix of competitive entry through self-provisioning, UNEs and resale. The Commission should not view its role as imposing an industrial policy on the country to promote the illusion that all or nothing facilities-based entry is feasible.

The capital markets have unequivocally repudiated the “field of dreams” model of network construction. Investors are no longer willing to let carriers build networks in anticipation that customers will fill them. Indeed, in today’s world, each part of a network construction plan must be supported by identified revenues before further funding is available. These are all facts, however, of which the Commission is well aware. Yet, many questions in the *Notice* seem to reflect an implicit acceptance of the ILECs’ false claim that the FCC is only a few UNE restrictions away from creating a new class of pure facilities, pure broadband competitor. This future, they claim, can only be achieved if the Commission eliminates or restricts UNEs despite clear language in the Act reflecting Congress’ appreciation that competition can only develop where UNEs are available.

To the extent that the Commission conducts an inquiry into whether any particular network functionality satisfies the statutory “impair” test in Section 251(d)(2), the Commission must not employ assumptions contrary to the assumptions underlying the statute. Above all, the FCC cannot assume that restricting the availability of UNEs will facilitate competition. The language of Section 251(d)(2) also requires the Commission to apply the impair standard from the perspective of the *requesting carrier*, not the ILEC or end users. This requirement has a direct impact on the factors the Commission can consider in applying the impair standard, as well as the way in which the Commission can consider them. Specifically, the Commission can only consider factors that potentially affect the *requesting carrier’s* ability to enter the market and “provide the services that it seeks to offer.” For these reasons, CompTel has strong reservations about the FCC’s so-called “granular” application of the impair standard. New entrants do not enter markets or provide services in a “granular” way. Certainly, their business

plans are not “granular,” and there is a real danger that a “granular” approach would ignore the extent to which all the pieces of an entrant’s business plan depend upon each other.

CompTel strongly opposes any application of the impair standard on a service-by-service basis. Such an approach is flatly contrary to the UNE regime in Section 251(c)(3) and Congress’ careful definition of the term “network element.” The FCC’s task is narrowly limited to determining which “network elements” shall be made available “for purposes of subsection (c)(3),” and the statutory language neither authorizes nor is consistent with the service-by-service approach. The Supreme Court rejected the service-by-service approach in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the Commission has never before used it as part of the impair analysis.

When analyzing the extent to which entrants may self-provision certain functionalities, the Commission must take into account the current state of capital markets and examine whether self-provisioning can be accomplished profitably. Capital markets have largely closed to competitive entrants in the last two years, the effect of which is that any FCC mandate requiring competitive carriers to replace UNEs with substantial investments in new facilities could be the last straw for competition. Hence, the Commission cannot take self-provisioning into account when applying the impair standard in this proceeding at this time.

CompTel urges the Commission to immediately bring its current rules and policies in line with the statutory requirements of the 1996 Act. In particular, the Commission must eliminate all restrictions on the use of the enhanced extended link (EEL) and eliminate the so-called switch carve-out that restricts the availability of the UNE Platform.

CompTel further reiterates its request that the Commission convene a Joint Conference and undertake other measures to obtain necessary input and participation by state

regulators in this proceeding. CompTel strongly opposes any “sunsets” or other phase-downs of UNE requirements as being anti-competitive and a deterrent to new investment and entry.

Finally, CompTel shares without reservation the FCC’s stated goal of promoting facilities-based competition in the broadband market segment, as well as every other segment of the telecommunications market. However, the Act does not endorse, and CompTel does not support, policies that seek to promote investment for its own sake at the risk of competition, which brings with it the multiple benefits of efficient investment, rapid deployment, innovative service creation, and increased consumer welfare. Therefore, CompTel does not support policies that offer the false promise of immediate all-or-nothing facilities based competition while erecting barriers to viable, facilities-based competition. Such policies harm the interests of consumers by undermining competitive market forces, and unfortunately would result in less, not more, long-term investment in facilities by erecting enormous barriers to entry. The FCC claims to desire to promote broadband investment, yet it is actively considering ILEC-sponsored proposals that would yield precisely the opposite result.

The best way to promote broadband infrastructure investment is by adopting policies to implement the statutory regime to maximize new entry and competition in the telecommunications industry. Attempting to persuade the ILECs to increase their investment by sweeping away competitors and dominant carrier regulation would only free the ILECs to exploit their monopoly power by restricting output, charging higher rates and engaging in less investment, as they historically have done when given the opportunity.

TABLE OF CONTENTS

	Page
SUMMARY	i
INTRODUCTION AND BACKGROUND	2
I. CONGRESS BASED THE 1996 ACT ON THE ASSUMPTION THAT MAKING UNEs AVAILABLE WOULD FOSTER LONG-TERM COMPETITION AND INVESTMENT IN ALL TYPES OF FACILITIES.....	7
A. The Act Does Not Authorize the Commission to Discriminate Against Entry by Means of UNEs or Resale in Favor of the Creation of New Facilities.....	8
B. New Entrants Need UNEs in Order To Implement Business Plans To Enter the Local Market and Ultimately To Construct Alternative Networks.	13
C. The 1996 Act Prohibits the Commission From Considering Whether Requiring ILECs To Unbundle Network Elements May Deter Investment by ILECs or Requesting Carriers.....	17
1. The Commission cannot consider factors that are fundamentally inconsistent with the 1996 Act.....	17
2. It is fundamentally inconsistent with the 1996 Act to consider whether requiring ILECs to unbundle a network element may deter investment by both ILECs and other carriers.	18
a. Unbundling Obligations of Section 271	20
b. Unbundling Obligations of All Incumbent LECs	22
3. Section 706 does not provide the Commission with independent authority to consider “additional factors” under Section 251(d)(2) that are fundamentally inconsistent with the 1996 Act itself.....	25
4. The 1996 Act provides no mechanism for the Commission to consider whether requiring ILECs to unbundle network elements harms competition by creating disincentives for investment.....	27
D. Congress Added the “At a Minimum” Language to Section 251 to Authorize the Commission to Make More UNEs Available, not Less.....	28
E. The Commission Cannot Forbear from Section 251 or Section 271 Until Both Sections Have Been Fully Implemented	30
II. THE COMMISSION SHOULD FOSTER BROADBAND DEPLOYMENT AS DIRECTED BY SECTION 706, WHICH CONGRESS BASED ON THE ASSUMPTION THAT MAKING UNEs AVAILABLE FOSTERS BROADBAND DEPLOYMENT BY FACILITATING COMPETITION.....	31
A. The Commission Should Encourage <i>Efficient</i> Investment in Broadband Infrastructure and Services.	31
B. The Best Way To Encourage Efficient Broadband Deployment is To Implement Fully the Market-Opening Provisions of the 1996 Act.	34
C. The Act Permits no Distinction Between “New” and “Old” ILEC Investment.....	40
D. Granting CompTel’s Petition for Reconsideration of the Line-Sharing Order Would Facilitate Deployment of Broadband Facilities	43

1.	The Commission should find affirmatively that the “low frequency” portion of the local loop satisfies the definition of the Commission’s existing subloop UNE.....	43
2.	The Commission should clarify that the ILECs’ line splitting obligation applies equally to requesting carriers using the UNE-P and UNE-L entry strategies.	45
3.	The Commission should clarify that once an ILEC qualifies a loop for DSL service, an ILEC may not assess additional qualification charges on subsequent carriers.....	48
E.	Ensuring that Competitors Have Access to Buildings Would Facilitate Broadband Deployment	48
III.	THE ACT REQUIRES THE COMMISSION TO PERFORM A THOROUGH IMPAIR ANALYSIS, NOT THE TYPE OF “GRANULAR” APPLICATION DISCUSSED IN THE NOTICE	49
A.	The Service-By-Service Application of the Impair Standard is Contrary to the Statute.....	52
B.	The 1996 Act Requires the Commission to Focus on Impairment from the Perspective of the Requesting Carrier, not the ILEC or the End Users.	60
1.	The Commission cannot apply the impair standard based solely upon a count of facilities.....	61
2.	The Commission should not consider the availability of tariffed offerings when applying the impair standard.....	64
3.	The Commission must consider the state of the capital markets when applying the impair standard.	65
4.	The Commission must consider profitability in determining whether a competitive carrier can self-provision.....	71
5.	The Commission must consider the amount of disruption that would occur if a UNE is removed from the national list in applying the impair standard.....	73
C.	Granular Application of the Impair Standard Would Be Too Administratively Burdensome.	75
D.	The Commission Cannot Remove UNEs or Impose Restrictions on UNEs Based on Putative Concerns About Universal Service or Access Charges.	76
E.	The ILECs Must Modify their Networks in Order To Provide Access to Unbundled Network Elements.....	77
F.	The Commission Should Adopt UNE Policies that Promote the Public Interest in Ensuring that Our Nation’s Telecommunications Networks Are Protected Against Terrorist Activities.	78
G.	The Commission Should Not Adopt Temporal Restrictions on UNEs.	83
IV.	THE ILECs HAVE NOT PRESENTED ANY FACTS TO SUPPORT A FINDING THAT SPECIFIC UNES NO LONGER MEET THE STATUTORY STANDARD.....	85
A.	The Triennial Review Is Not a Reconsideration Proceeding.....	85
B.	The Current UNEs and UNE Combinations, Including UNE-P, Should Be Maintained.	86

C.	UNEs Should Not Be Removed From the National List Prior to Full Compliance by the ILECs with the Unbundling Requirements.....	86
D.	The Commission Should Not Retain the Three-Year Periodic Review Cycle.	87
V.	THE COMMISSION SHOULD DECLARE THAT EELS ARE STAND-ALONE UNEs.....	88
VI.	THE COMMISSION SHOULD IMMEDIATELY BRING THE CURRENT RULES INTO COMPLIANCE WITH THE STATUTE	90
A.	The Commission Should Immediately Lift the Use Restrictions on EELs.	90
1.	UNE restrictions are contrary to the 1996 Act.....	90
2.	Use restrictions do not promote any valid public policy objectives.	93
B.	The Commission Should Lift the Co-Mingling and Collocation Restrictions On EELs.....	95
C.	The Commission Should Eliminate the Switch Carve-Out.	99
VII.	THE COMMISSION SHOULD CONVENE A FEDERAL-STATE JOINT CONFERENCE ON UNES	103
VIII.	THE COMMISSION SHOULD ADOPT REASONABLE TRANSITION RULES FOR REMOVAL OF UNEs FROM THE NATIONAL LIST	107
	CONCLUSION.....	110